IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.1635 OF 1993

Shriram Ramphal Patel,)
Residing in the Property known)
as Sharma Building, Plot Nos.34)
& 35, 4th Road, Khar (West),)
Bombay - 52.).. Petitioner

Versus

1. The Municipal Corporation)
for Greater Bombay, a)
Statutory Body, having its)
office at Mahapalika Marg,)
Fort, Bombay - 1.)

2. State of Maharashtra,)
Mantralaya, Bombay 400 032.)

3. Shri Shirsate,)
Dy.Collector, having his)
office at Andheri, Bombay.)

4. The Court Receiver,)
High Court, Bank of India)
Building, Fort,)
Bombay 400 001.).. Respondents

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Shri M.V.Holamgi for the petitioner.

Shri Vinod Mahadik for the respondent No.1.

Ms S.M.Dandekar for the respondent No.2.

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CORAM : R.M.S.KHANDEPARKAR &
V.M.KANADE, JJ.

DATED : 16TH AUGUST, 2005.

ORAL JUDGMENT: (Per R.M.S.Khandeparkar, J)

1. Heard. By the present petition, the petitioner is seeking direction by way of writ of mandamus against the respondent Nos.1 and 2 requiring them to re-erect the shed of the petitioner to the extent of an area occupying 2000 sq.ft. on the ground that the demolition of the shed was not in accordance with the provisions of law and was without following the due process of law.

2. It is the contention of the petitioner that he had been residing on the ground floor of the building known as "Sharma Building" and carrying on his business of purchase and sale of iron scrap and other miscellaneous business in his own shed situated towards the Northern end of the property known as "Sharma Building" and the said shed was extending from the East to the West on the rear side of the said building. It is his further contention that the shed has been duly surveyed in the survey records and has been in existence since prior to 1962. By way of amendment, it was clarified by the petitioner that the shed occupied was an area of 2000 sq.ft. Since the shed was in extremely dilapidated condition, the petitioner approached the respondent No.1 by letter dated 21st December, 1985 requesting for permission for repairs to the said shed. After persistent effort

on the part of the petitioner, permission for repairs was granted to the petitioner by the respondent No.1 by its letter dated 14th October, 1991 subject to the certain terms and conditions incorporated in the said letter. The petitioner, on his part, by the letter dated 22nd October, 1991 objected for imposition of one of the conditions relating to demolition of rear portion of the said shed on the ground that the said portion of the said shed being not unauthorised structure. Meanwhile, the petitioner also carried out the repairs to the said shed. However, the respondent No.1 issued a stop work notice under Section 354-A of the Bombay Municipal Corporation Act, hereinafter called as "the said Act", on 7th December, 1991 on the ground that under the guise of carrying out the repairs, pursuant to the permission granted to the petitioner, he had been carrying out additions and alterations to the said shed, which was refuted by the petitioner under his letter dated 14th December, 1991. The respondent No.1 thereafter carried out inspection of the premises through its officers and subsequently under the letter dated 19th December, 1991 withdrew the notice issued under Section 354-A of the said Act. After the completion of repair works, the petitioner was served with the letter dated 10th December, 1993 alleging violation of the terms and conditions of the

repair permission granted to the petitioner, and therefore, the petitioner was required to show cause against revocation of the repair permission and necessary action in terms of the provisions of the said Act. The notice was replied by the petitioner under his letter dated 19th April, 1993 denying the allegations against the petitioner. The respondent No.1 however under letter dated 5th May, 1993 rejected the contention of the petitioner and directed him to demolish the unauthorised structure mentioned under Item Nos.2 and 3 of the letter dated 10th February, 1993. The petitioner again addressed the letter dated 21st May, 1993 to the respondent No.1 to reconsider the matter while contending that rear portion of the shed was authorised structure and had been in existence prior to 1962. It is further case of the petitioner that inspite of the fact that the structure in question being not unauthorised one, nor it was an extension of the existing structure, the respondent No.1 demolished the rear western portion of the shed on or about 7th June, 1993. It is further case of the petitioner that the respondent No.2 thereafter demolished the structure occupying an area of 1700 sq.ft. without any authority of law and without following the due process of law, on 31st March, 1995 when in fact, the present petition was pending for

hearing. The petitioner, therefore, prays for direction as stated above.

3. It is the case of the respondent No.1, on the other hand, that while granting permission for repairs to the petitioner, the respondent No.2 had specified the size of the structure along with its size which was permitted to be repaired and the permission granted under letter dated 14th October, 1991 was not in reply to the application dated 21st December, 1985 but it was pertaining to the application dated 20th June, 1992 and was subject to the various conditions including the condition that the Corporation would not be responsible for any legal dispute arising in the matter and further that the room situated at the western side of the structure, which was not assessed to municipal taxes, was required to be removed by the petitioner before commencement of the repair works. It is, therefore, on account of non-compliance of the said conditions particularly relating to the structure not assessed to municipal taxes, that the authorities had to revoke the licence and to take action for demolition of the structure. According to the respondents, the same was preceded by an appropriate notice, and therefore, requirement of law was duly complied with before demolishing the actual structure.

As regards the remaining area of 1700 sq.ft. and the demolition thereof by the respondent No.2, it is the contention on behalf of the respondents that the structure was totally unauthorised one and the competent authority had infact issued a proper notice to the petitioner for removal thereof, and on account of failure to comply with the notice, the authorities demolished the structure.

4. Being a writ petition seeking relief in the nature of mandamus for direction to re-construct and restore the demolished structure claimed to be belonging to the petitioner, it is primarily necessary for the petitioner to plead and establish that the structure which is said to have been demolished was a lawful structure and it belonged to the petitioner. We hasten to say that it does not mean that even illegal structure can be demolished by the respondents by taking law in their hands. However, a person seeking an equitable relief by way of writ petition has to approach the Court with clean hands. Being so, the petitioner seeking relief in the writ petition in the nature of writ of mandamus has to disclose sufficient factual matrix based on which the petitioner could claim to have acquired the right which is sought to be denied by the respondents,

inspite of the respondents being duty bound to respect such right.

5. Perusal of the petition nowhere discloses any pleading regarding the legality of the structure in question as well as the right, if any, of the petitioner to the structure in question. Even the description of the structure is very vague. The petition nowhere discloses any material wherefrom it can be concluded that the structure in question was in fact in existence prior to 1962 as alleged by the petitioner. To the specific query in that regard, the learned advocate appearing for the petitioner has drawn our attention to a plan stated to have been issued by the City Survey Authorities and copy of which is to be found at page 30 of the petition. The copy of the plan apparently discloses the same having been issued in January, 1986. The plan nowhere on the face of it discloses that the structures which are shown in the said plan were in existence since or prior to 1962. Whether a structure had been in existence from a particular date or not is purely a question of fact, and therefore, a person who wants to believe the writ court that the structure had been in existence since or prior to 1962 has to properly plead the said fact and produce cogent and convincing

supporting material in that regard. Mere copy of the survey plan stated to be of the structure in question by itself does not disclose that the structure had been in existence since 1961. It is nobody's case that the plan was prepared pursuant to the survey conducted prior to 1962, nor the copy of the survey plan states any such thing. Apart from the said copy of the said survey plan, there is no other material on record which can, in any manner, substantiate the contention of the petitioner that the structure in question had been in existence since 1961.

6. Apart from mere existence of the structure, it is also necessary for a party complaining about the illegal demolition of the structure to reveal the fact regarding the legality of the structure as well as ownership or lawful occupation thereof. Apart from mere claim that the structure is owned by or belonged to the petitioner, the petitioner has not been able to produce any document, either along with the petition or in the course of arguments to substantiate such claim on the part of the petitioner.

7. The learned Advocate for the petitioner, however, referring to the licence for repairs granted to the petitioner, has argued that there has been no

dispute about the legality of the structure or lawful occupation and the ownership thereof in favour of the petitioner. Plain reading of the licence for repairs granted under letter dated 14th October, 1991 discloses that the contention is totally devoid of substance. While issuing licence, the Corporation has specifically imposed certain conditions and one of the conditions was to the effect that "the Corporation will not be held responsible if any legal dispute arises". That apart, the petitioner was specifically required to remove a portion of the structure which was not assessed to municipal taxes. This apparently discloses that, by issuing licence for repairs of the structure, the Corporation has not admitted that the petitioner was either owner of the structure or was in lawful occupation thereof. It is also pertinent to note that, in the petition, the petitioner himself has stated that in view of the extremely dilapidated condition of the structure, the petitioner approached the respondent No.1 for necessary permission to repair the said structure. Undoubtedly, it is the duty of the Corporation to ensure that the structure which is in dilapidated condition is either repaired expeditiously or an action is taken to demolish such structure so that no harm is caused to any person on account of such dilapidated condition of a structure

situated within the limits of the jurisdiction of the Corporation. Being so, merely because a person approaching the Corporation seeks permission for repairs of a structure, that by itself cannot lead to a conclusion that the person to whom permission is granted is deemed to be the owner or lawful owner of the structure. The action taken by the Corporation was, as a part of its public duty, to ensure safety to the human being in the territory of the Corporation and the same cannot be misconstrued in favour of a person in relation to any structure without establishing a lawful right to such structure by following the procedure known to law.

8. As already observed above, the petition and the materials placed alongwith the petition nowhere disclose that the structure in question was either lawful structure or that the petitioner was lawful owner thereof or had been in lawful occupation thereof.

9. Added to above, it is undisputed fact that the licence for repairs was granted on condition that the petitioner shall demolish the western side of the structure which was not assessed to municipal taxes. It is also undisputed fact that the petitioner did not

demolish the said portion of the structure even though carried out repairs to the said structure by taking advantage of the licence granted under the letter dated 14th October, 1991. In other words, while availing the benefits under the said letter, the petitioner did not comply with its obligation attached to the permission granted under the said letter. It is also pertinent to note that the petitioner has not been able to establish that the western side of the structure was assessed to municipal taxes. Infact, it is the case of the respondents that the same had not been assessed to municipal taxes. Being so, the Corporation having issued notice for removal of such structure in terms of the said condition and the petitioner having failed to comply with the said direction, if the Corporation proceeded to demolish the said structure, then the Corporation cannot be blamed of having acted illegally or in contravention of the provisions of law.

10. As regards the structure occupying of an area of 1700 sq.ft., though the learned Advocate for the petitioner has strenuously argued that the respondents have demolished the said structure by taking law in their hands inasmuch as that no prior show cause notice was issued, nor sufficient opportunity of

establishing the rights of the petitioner to the structure and legality of the structure was afforded to the petitioner, the fact remains that the petitioner even in the writ petition has not been able to disclose and establish that the structure was a lawful structure and it lawfully belonged to the petitioner.

11. At this stage, it is necessary to refer to certain interim orders which were passed by this Court in this petition. In a Notice of Motion No.162 of 1995 taken out by the petitioner himself, the learned Single Judge had observed that :-

> "In view of the above facts, the Petitioner is directed to approach the Court in the above Civil Suit being High Court Suit No.7048/81. This is particularly because it is not possible for me in writ jurisdiction to examine the alleged conduct of the Receiver which is appointed in the above suit. Moreover, evidence will be required in the present case which is not possible in Writ Petition."

12. Further in another Notice of Motion taken out

by the petitioner being Notice of Motion No.197 of 1995, the learned Single Judge by order dated 8th May, 1995 had, while refusing any relief under the said Notice of Motion, reiterated the observations made in the order dated 21st April, 1995.

13. When the present petition came up for hearing on 18th August, 1995, the learned Single Judge dealing with the matter had passed the following interim order:-

> "During the course of hearing of this petition I did inquire from the learned counsel for the petitioner as to what was the title of the petitioner in respect of the land on which the structure in dispute is supposed to have been constructed by the petitioner in the year 1961. The learned counsel for the petitioner informs the Court that the petitioner claims to be in adverse possession of the land from the year 1961. The petitioner is directed to file affidavit giving full details in respect of his alleged title to the land on which the structure in dispute is supposed to have been constructed in the year 1961, if any. The petitioner is directed to annex all the

> documents on which the petitioner is relying upon. Prima facie I get an impression that this petition is an abuse of the process of law. This question shall be examined in depth after affidavit is filed by the petitioner disclosing his alleged title, if any, in respect of the land. At this stage, the learned Advocate for the petitioner desires to resile from the plea of ‘adverse possession’."

The paragraph 2 of the said order specifically directed that :-

> "affidavit to be filed within one week and copy thereof shall be given to the learned counsel appearing on either side."

The records nowhere disclose any such affidavit having been filed by the petitioner. Indeed, it is surprising that inspite of the specific observation that "prima facie I get an impression that this petition is an abuse of the process of law", which observation was made following the failure on the part of the petitioner to prima facie satisfy about the title of the petitioner to the land in question and the structure thereon. Curiously enough, inspite of

the specific direction having been given to file affidavit disclosing the fact relating to the title to the land and the structure thereon, the petitioner has chosen to remain silent about it and has failed to render necessary assistance to the Court in that regard. There is neither explanation for not filing such affidavit, nor willingness expressed to file such affidavit.

14. The net result of the above discussion is that apart from the failure on the part of the petitioner to produce necessary materials in support of his claim regarding the structure being legal and the petitioner being lawful owner and/or possessor thereof and inspite of the specific direction with sufficient opportunity to substantiate such claim by filing proper affidavit, the petitioner has chosen not to place on record either such affidavit or any other material in support of his claim. In such circumstances, we are left with no alternative than to confirm the prima facie finding which was arrived at on 18th August, 1995 that the petition is nothing but sheer abuse of the process of Court.

15. Certainly, illegality to be discouraged. Wrong needs to be remedied. Authoritarian autocracies

to be condemned, and the victims to be compensated. But that does not mean that a person should be encouraged to reap the fruits of his own illegal activities. Encroachers do not desire encouragement to get unjustly enriched with ill-gotten wealth in any form. It is well said "the law is reason, free from passion." Restrain on exercise of judicial discretion is to be preferred when exercise of such power would result in restoring an absolute illegality on the part of the petitioner. It is also to be borne in mind that even though the authority acts without jurisdiction or without complying the statutory provision before taking an action, if interference in such action is bound to result in giving undue advantage to a person of his own illegal acts, certainly non-interference in such action of the authority should be preferred. The Apex Court in **Maharaja Chintamani Saran Nath Shahdeo v State of Bihar and Ors.,** reported in (1999) 8 SCC 16 had observed that where setting aside an order on the ground of lack of jurisdiction would result in the revival of an illegal order, it would be preferable to desist from interfering even in such order without jurisdiction. In our considered opinion, the exercise of the powers under writ jurisdiction cannot be made available to a person who seeks a legal sanction to

his illegal act, even though the authority at times exceeds its jurisdiction or power while taking action against illegal act by such person.

16. Undoubtedly, the authority acting illegally can be independently dealt with in relation to its alleged illegal acts, but it cannot enure to the benefit of the petitioner who himself is a wrongdoer. Considering the same and in the facts and circumstances of the case, the petitioner having failed to establish any right to the structure which is stated to have been demolished by the respondents and for having not complied with the specific direction issued by this Court under order dated 18th August, 1995, and having failed to avail sufficient opportunity given to the petitioner to substantiate his claim, we do not find any case being made out by the petitioner for grant of relief prayed for. On the contrary, in the facts and circumstances, the petition deserves to be dismissed with exemplary costs of Rs.5,000/-. The cost shall be paid by the petitioner within a period of four weeks from today in the Registry and on payment thereof, the Registry is directed to credit the same to the account of Maharashtra State Legal Services Authority. The petition is accordingly dismissed. Rule is

discharged.

17. At this stage, the learned Advocate for the petitioner has prayed for stay of the order passed today as well as leave to appeal. As far as the prayer for leave to appeal is concerned, we do not find any important question of law involved in the matter which needs further adjudication, and therefore, leave to appeal is rejected. As far as the prayer for stay of the order passed today is concerned, the same is granted for a period of eight weeks from today.

(R.M.S.KHANDEPARKAR, J)

(V.M.KANADE, J)